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BURSA MALAYSIA SECURITIES BHD v. MOHD AFRIZAN HUSAIN

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
ZALEHA YUSOF FCJ
B RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 02(f)-39-07-2021(W)]
31 MARCH 2022

C **Abstract** – *Bursa Malaysia Securities Berhad is not obliged to immediately and summarily de-list a listed corporation upon the listed corporation being served with a winding up order without regard to any appeals or legal challenges thereto, but should only do so upon a final determination of the said appeals or legal challenges; this said, in order* D *to gain the corporation's continued listing, the liquidator of such a corporation in liquidation must continue to comply with the relevant Listing Requirements as provided under the law.*

E ***COMPANY LAW:*** *Winding up – Appointment of liquidator – Liquidator's refusal to prepare company's annual report and financial statements – Whether breach of ACE (Access, Certainty, Efficiency) Market Listing Requirements ('AMLR') – Whether compliance with Listing Requirements within scope of liquidator's powers and duties under Companies Act 2016 – Whether Bursa obliged to summarily de-list corporation upon it being served with winding up order – Whether Bursa* F *entitled to exercise discretion to modify or waive compliance of its own rules – Whether director of listed corporation in liquidation could continue to ensure compliance of Listing Requirements without authorisation of liquidator or court – Whether liquidator duty bound to comply with provisions of AMLR*

G ***STATUTORY INTERPRETATION:*** *Construction of statutes – ACE (Access, Certainty, Efficiency) Market Listing Requirements, r. 16.11(2) ('AMLR') – Interpretation of – Whether AMLR issued pursuant to s. 378 of Capital Markets and Services Act 2007 – Whether AMLR of statutory origin and has statutory force binding all participants and investors in Malaysian Stock Exchange and Bursa – Whether Bursa bound to immediately de-list corporation upon pronouncement of order of winding up – Whether primary duty of Bursa to ensure public investor* H *protection – Capital Markets and Services Act 2007, s. 11*

WORDS & PHRASES: *'shall' – ACE (Access, Certainty, Efficiency) Market Listing Requirements, r. 16.11(2) – Whether 'shall' has single firm or settled meaning – Whether 'shall' denotes mandatory obligation – Whether there was duty* I *or obligation on Bursa to immediately de-list corporation upon pronouncement of it being wound up – Whether there is danger in construing 'shall' in vacuo and without consideration of ACE (Access, Certainty, Efficiency) Market Listing Requirements and Capital Markets and Services Act 2007*

Wintoni Group Berhad ('Wintoni'), a listed corporation on the ACE Market of the appellant, Bursa Malaysia Securities Berhad ('Bursa'), was wound up by the Kuala Lumpur High Court. The respondent, Mohd Afrizan Husain ('Afrizan') was appointed the liquidator of Wintoni in the winding-up order. Afrizan provided a letter of undertaking ('LOU') to Bursa pursuant to r. 2.22 of the ACE (Access, Certainty, Efficiency) Market Listing Requirements ('AMLR') to the effect that, in consideration of Bursa allowing the continued listing of Wintoni on the official list, he would comply with the AMLR (including any amendment) applicable to him. However, Afrizan then issued a general announcement stating that he would not prepare Wintoni's annual report, including the annual audited financial statements together with the auditors' and directors' reports for the financial year ended 31 December 2016, and any financial statements for any subsequent financial periods. Bursa conducted an inquiry in relation to the delay in the announcement of Wintoni's quarterly reports for the financial period ended 30 September 2017 and December 2017 (due on 30 November 2017 and 28 February 2018 respectively). Through emails, Afrizan took the stand that as Wintoni had ceased operations, he would not prepare the relevant financial statements. He had not delegated compliance with the AMLR to the directors and did not arrange for the directors and/or management or any agent to comply with the AMLR. Bursa subsequently issued a requisite notice together with a Listing Committee (LC) memo, giving notice to Afrizan on the proposed enforcement action against him and specifying the nature and particulars of his breach of the AMLR. Afrizan responded by reiterating his earlier stance. The LC deliberated on the facts and evidence presented to them, including Afrizan's representations and found that he had breached the AMLR. The LC imposed a public reprimand on him and directed him to do the necessary to ensure announcement/issuance of the financial statements within three months from the date of notification of the LC's decision. Afrizan appealed to the Appeals Committee (AC) on the ground that he did not have to comply with the Listing Requirements as once a listed corporation is wound up, it will immediately be de-listed and the winding-up provisions of the Companies Act 2016 ('Companies Act') would be applicable. The AC upheld the LC's decision on the basis that the Bursa had the power and discretion not to de-list Wintoni pending final disposal of court proceedings challenging the winding-up order and as long as Wintoni remained on the official list, Afrizan was bound to comply and to ensure Wintoni's compliance with the AMLR. Bursa then announced Afrizan's public reprimand. Afrizan instituted judicial review proceedings in respect of the decisions of the LC and the AC. The High Court granted Afrizan the reliefs sought, namely an order of *certiorari* against Bursa to strike out the decisions of the LC and the AC and a *mandamus* order against Bursa to announce that the public reprimand against Afrizan was null and void. The High Court was

of the view, *inter alia*, that (i) preparation of the outstanding financial statements requested by Bursa was inconsistent with the statutory duties of the liquidator under the Companies Act; (ii) Afrizan, as a court-appointed liquidator, was an agent of the court and subject to the court's supervision pursuant to s. 486 of the Companies Act and could not do what was outside the scope of his powers, and his primary duty was to wind up the business of Wintoni; (iii) the LOU was general and did not specify that Afrizan was to prepare Wintoni's financial statements and related reports; and (iv) r. 16.11(2) of the AMLR is a mandatory provision stipulating that Bursa 'shall' de-list Wintoni when the court made the winding-up order. The Court of Appeal, in dismissing Bursa's appeal and affirming the decision of the High Court, held that the decisions of the LC and AC were tainted with illegality, error of law and irrationality such that the said decisions were amenable to judicial review. The Court of Appeal was of the view that upon a literal interpretation of r. 16.11(2) of the AMLR, it was non-negotiable that the said rule stipulates mandatory requirements for de-listing. Before this court, leave to appeal was allowed on the following questions (i) whether compliance with the Listing Requirements is consistent with and/or within the scope of the liquidator's powers and/or duties under the Companies Act or otherwise in law ('question 1'); (ii) whether on a proper construction/interpretation of rule/para. 16.11(2) of the Listing Requirements, Bursa is not obliged to immediately and summarily de-list a listed corporation upon the listed corporation being served with a winding-up order without regard to any appeals/legal challenges to the winding-up order but should only do so upon a final determination on the said appeals/legal challenges; ('question 2'); (iii) alternatively, whether Bursa is entitled to exercise its discretion to modify and/or waive compliance of its own rules, including rule/para. 16.11(2) of the Listing Requirements by virtue of, amongst others, r. 2.07(2) of the AMLR and para. 2.06(2) of the main LR ('question 3'); (iv) whether the liquidator, as the person in control of the management of a listed corporation in liquidation, must undertake to continue to comply with the Listing Requirements as consideration for the continued listing of a listed corporation in liquidation ('question 4'); and (v) whether a director in a listed corporation in liquidation could continue to ensure compliance of the Listing Requirements by the listed corporation without the authorisation by the liquidator and/or court ('question 5').

Held (allowing appeal with costs)

Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The AMLR is issued pursuant to s. 378 of the Capital Markets and Services Act 2007 ('CMSA'). It is apparent from s. 378 of the CMSA that the power to make such regulations is conferred by Parliament on the Securities Commission which must obtain approval of the Minister

in order for the regulations to take effect. The AMLR, therefore, trace their roots back to the statute. Thus, the AMLR are of statutory origin and therefore have statutory force. Apart from the statutory nature of the AMLR which binds all participants and investors in the Malaysian Stock Exchange and Bursa, there was a separate and independent contractual relationship between Bursa and the listed corporation, *ie*, Wintoni, as well as Afrizan as the person in control of Wintoni. Wintoni and the directors, officers and persons having control of it were contractually bound by, *inter alia*, the regulations. There was, therefore, both a statutory relationship as well as a contractual relationship between Bursa and Afrizan. (paras 30, 31, 44 & 45)

(2) The core question here was whether Bursa was bound, rigidly, to immediately de-list a listed corporation upon the pronouncement of an order of winding up by a High Court, pursuant to r. 16.11(2) of the AMLR. This issue arose by reason of the word 'shall' utilised in r. 16.11(2) as opposed to 'has a duty to' or 'must.' 'Shall' does not have a single firm or settled meaning. It takes its meaning from the context in which it is used. It is clear from r. 2 of the AMLR that the entirety of the Rules is permissive in relation to Bursa. The AMLR is promulgated to ensure compliance at the behest of Bursa in the exercise of its regulatory function. The primary duty of Bursa is encapsulated in s. 11 of the CMSA. As such, there could be no adequate or proper statutory interpretation of r. 16.11(2) without having regard to the primary function of Bursa as a regulatory authority whose primary duty is to ensure public investor protection. These Rules, including r. 16.11(2) of the AMLR, are made to ensure compliance can be effected in the public interest of providing investor protection. So, to now construe the word 'shall' in r. 16.11(2) without having any regard to the wider provisions of the rules holistically and in the context of the CMSA was a fundamental error. (paras 57-62)

(3) To answer the question of how the word 'shall' in r. 16.11(2) of the AMLR is to be construed, it is necessary to construe the rule in the context of the CMSA and its primary duties. It is the duty of the court to construe the particular provision to ascertain the intention of the legislature by analysing the true meaning of the rule in the context of a holistic reading of the AMLR as well as the CMSA. The question for consideration was whether Bursa was mandatorily bound to de-list the company by reason of r. 16.11(2) of the AMLR notwithstanding the express provisions of s. 11 of the CMSA which require that Bursa act (i) firstly, in the interests of the public for the protection of investors; and (ii) that where the public interest for the protection of investors conflict with the law relating to corporations, the former

prevails. Put it in another way, in a situation where it may not be in the public interest for the protection of investors for a wound up listed company to be de-listed, was it tenable to construe r. 16.11(2) as prescribing a mandatory statutory directive that prevailed over (i) the rest of the AMLR read holistically; (ii) s. 11 of the CMSA; and (iii) the purpose and object of the CMSA taken as a whole. The answer must be no. The use of the word 'shall' does not always mean that it is being used mandatorily. There are numerous instances where the word 'shall' is used in a way that does not denote a mandatory legal obligation. (paras 63, 68, 69, 70 & 71)

(4) Where an order of court declares that a listed corporation is wound up, the primary concern of Bursa is to ensure that there is continued compliance with the rules, *ie,* the AMLR, so that there is continued disclosure about the workings of the listed corporation, and the steps being taken to keep it in operation or otherwise. Such disclosure through periodic returns comprised the primary means by which the investor public will be apprised of what is going on in the wound-up entity, which remains a listed corporation. Therefore, such disclosure is of central importance and the Rules are crafted to regulate the same. (para 79)

(5) In a winding-up situation, the directors ceased to have control of the assets and operations of the company, which are taken over by a liquidator. The liquidator is in possession of the assets of the listed corporation and has primary control over the operations and assets of the company. It is for this reason that the Listing Requirements in the form of the AMLR require that the liquidator, as the new person taking over control, ensures continued compliance. The existence of r. 2.22(1) of the AMLR in itself evidences the fact that upon the pronouncement of a winding-up order in relation to a listed corporation, Bursa is not bound to immediately de-list the entity. If so, there would be no provision for the person in control of the wound up listed corporation to provide continued disclosure, as it would be superfluous. This, in turn, fortified the interpretation of "shall" as not being mandatory in nature, but directory, at the behest of Bursa. (paras 80-82)

(6) Given that Afrizan had complied with r. 2.22(1), it was incumbent upon him, as liquidator, to ensure compliance with the AMLR, both by reason of the sheer existence of the Rules, as well as the specific LOU provided by him. It was completely untenable for the liquidator, as the person in control of the listed corporation, to take matters into his own hands and undertake his own construction of the listing rules

to determine that he no longer owed any obligation of compliance. This too, by undertaking his own personal construction of rr. 16.11(1) and 16.11(2), and then concluding that because one says "may" and the other says "shall" respectively, r. 16.11(2) must be complied with by Bursa resulting in the liquidator no longer having any duty of compliance. Moreover, Afrizan went on to unilaterally implement his own construction of the rules, notwithstanding the LOU he had personally executed. This was untenable on the part of any prudent, responsible liquidator who was bound to have cognisance of the workings of a listed corporation and the impact of winding up on the interests of investors as a whole. (paras 83 & 84)

(7) A further and important reason for concluding that the term "shall" in r. 16.11(2) of the AMLR does not connote, nor warrant a meaning that the word is utilised in its mandatory form, is the effect or consequence of construing it as mandatory in nature. The net result of interpreting the word "shall" in the said rule as amounting to a mandatory directive, is that upon the pronouncement of the order of winding-up by the High Court, Bursa is bound to immediately de-list the listed corporation with no opportunity to ascertain the basis for the winding up or whether the listed corporation is truly insolvent or has been wound up for one of the numerous other bases specified in the winding up legislation under the Companies Act. Neither is the fact that the order may not be final but subject to further legal challenge allowed to be taken into consideration. When this is coupled with a reading of r. 16.11(2) of the AMLR such that the listed corporation is also immediately de-listed, the consequences on the investing public will also be dire. The fact of de-listing will have an immediate impact on all investors who have invested in the listed corporation. The damage to the investors is irreparable. If the order of winding up is then reversed on appeal or stayed, then the de-listing would have already occurred, with no opportunity to reverse that, simply because de-listing could not be reversed. The listed company and the investor public, *ie*, the shareholders of Wintoni would have suffered irreparable damage. The listing status of a company has a value attached to it. That value would be irrevocably lost if de-listing were to immediately follow the making of a winding-up order without any opportunity being accorded to Bursa to evaluate the circumstances leading up to the same. More importantly, given the level of damage that would be suffered by both the investing public and the listed corporation, such a reading is contrary to the statutory duty of Bursa to protect the interests of public investors. The fact that the winding-up order against Wintoni was terminated on 17 September 2019 illustrated the danger of construing the word "shall" *in vacuo* and

without consideration for the rest of the AMLR and the CMSA. The consequences of reading "shall" as a mandatory consequence of an order of winding-up which is capable of being reversed, is dire. (paras 88, 90, 91, 93 & 94)

(8) Rules 2.07(2) of the AMLR and 2.06(2) of the Main Listing Requirements allow Bursa to waive or modify compliance with the Listing Requirements. The effect of this provision in the AMLR is clear, namely that Bursa is empowered to modify or waive compliance with the rules when such compliance would not meet its statutory duties under the CMSA or is not in the spirit, intention and purpose of the AMLR. In the present context, it means that Bursa is entitled to decide to waive or modify the effects of r. 16.11(2), even if it is read in its most extreme form of imposing a positive and immediate obligation to de-list. Therefore, even if it is read as amounting to a mandatory requirement, Bursa could not be faulted for deciding not to de-list the corporation immediately, given its powers to balance the need to de-list against the public interest of investor protection. This meant that the word 'shall' was not mandatory in nature but was directory, meaning that Bursa may de-list the listed corporation after taking into consideration the relevant interests as outlined in the CMSA and the AMLR, at an appropriate time, and not immediately upon pronouncement of the winding-up order. As such, questions 2 and 3 were answered in the affirmative. Accordingly, question 4 was also answered in the affirmative. Thus, there was no duty or obligation on the part of Bursa to immediately de-list a company upon pronouncement of the listed corporation having been wound up. It followed that the liquidator, as the person in control, was duty-bound to comply with the rest of the provisions of the AMLR. This answered question 1. (paras 95, 97, 98 & 99)

(9) A court appointed liquidator is an officer of the court with express and clear duties and functions. It must follow that as an officer of the court, he is cognisant of, and complies with the law. The highest standards in respect of compliance with the law are required of him. In view of the express provisions of the CMSA, which the liquidator was bound to be cognisant of, as he was undertaking the liquidation of a listed corporation, he ought to have been fully aware that the provisions of the CMSA prevail over that of the law relating to corporations where public interest in the form of investor protection is concerned. As such, and given the express LOU he executed, it was clear that the liquidator was bound by the law as set out in, *inter alia*, the CMSA and the AMLR. The express provisions of the LOU made this clear beyond dispute. It specified that in consideration of Bursa allowing Wintoni to remain listed and on the official list, he the liquidator,

undertook and agreed to comply with the AMLR and any amendments to the same in so far as they were applicable to him. To try and avoid such an express and unequivocal legal obligation of disclosure in the interests of both Wintoni and the investor public, by suggesting that Bursa was bound to de-list Wintoni there by absolving him from any need to comply with the LOU, was unacceptable conduct on the part of an officer of the court, from whom the highest standards of integrity are expected. It had been contended for Afrizan that the use of the words "in so far as the same apply to me" somehow exonerated him from the obligation to comply with the LOU. However, those words could not override his statutory duty as a liquidator to fulfil this requirement. (paras 102 & 103)

(10) Question 5 was related to whether a director of a listed corporation in liquidation could continue to ensure compliance with the AMLR where there is no authorisation by the liquidator or the court. The answer to this question was in the negative because the director could not provide the requisite disclosure as stipulated under the AMLR or the Main Listing Requirements without the consent, authorisation or approval of the liquidator who is the person in control of the listed corporation in liquidation. He, therefore, had no basis on which to provide such disclosure. It is the duty of the person in control, namely the liquidator, to provide such disclosure. The liquidator is in a position to procure the relevant information from the directors or to direct them to provide the requisite disclosure to Bursa. In point of fact, it was incumbent upon the liquidator to procure the directors to make the requisite disclosure in compliance with the AMLR where he was unable to do so personally because he was unable to do so or had no relevant knowledge. It was his legal obligation to do so, in keeping with the requirement to comply with the provisions of the law under the Companies Act, the CMSA and the AMLR. Question 5 was, therefore, answered in the negative. (paras 105-107)

Bahasa Melayu *Headnotes*

Wintoni Group Berhad ('Wintoni'), sebuah syarikat tersenarai di Pasaran ACE perayu, Bursa Malaysia Securities Berhad ('Bursa'), digulung oleh Mahkamah Tinggi Kuala Lumpur. Responden, Mohd Afrizan Husain ('Afrizan') dilantik sebagai pelikuidasi Wintoni dalam perintah penggulungan. Afrizan memberikan surat janji ('LOU') kepada Bursa menurut Peraturan 2.22 ACE (Akses, Kepastian, Kecekapan) Keperluan Penyenaraian Pasaran ('AMLR') yang menyatakan bahawa dengan pertimbangan Bursa membenarkan penyenaraian Wintoni berterusan dalam senarai rasmi, dia akan mematuhi AMLR (termasuk sebarang pindaan) yang terpakai padanya. Walau bagaimanapun, Afrizan kemudian membuat

pengumuman umum yang menyatakan bahawa dia tidak akan menyiapkan laporan tahunan Wintoni yang merangkumi penyata kewangan tahunan yang diaudit bersama-sama dengan laporan juruaudit dan pengarah untuk tahun kewangan yang berakhir pada 31 Disember 2016 dan apa-apa penyata kewangan untuk tempoh kewangan berikutnya. Bursa melakukan siasatan berkaitan dengan kelewatan pengumuman laporan suku tahunan Wintoni untuk tempoh kewangan yang berakhir pada 30 September 2017 dan Disember 2017 (dijadualkan pada 30 November 2017 dan 28 Februari 2018 masing-masing). Melalui e-mel, Afrizan mengambil pendirian bahawa oleh kerana Wintoni berhenti beroperasi, dia tidak akan menyiapkan penyata kewangan yang berkaitan. Dia tidak mewakilkan kepatuhan AMLR kepada para pengarah dan tidak mengaturkan agar para pengarah dan/atau pengurusan atau ejen mana pun mematuhi AMLR. Bursa kemudian mengeluarkan notis yang diperlukan bersama-sama dengan memo jawatankuasa penyenaraian (LC), memberi notis kepada Afrizan mengenai cadangan tindakan penguatkuasaan terhadapnya dan menyatakan sifat dan butir-butir pelanggarannya terhadap AMLR. Afrizan membalas dengan mengulangi pendiriannya yang terdahulu. LC membincangkan fakta dan bukti yang dikemukakan kepada mereka, termasuk perwakilan Afrizan, dan mendapati bahawa dia telah melanggar AMLR. LC mengenakan teguran am kepadanya dan mengarahkannya untuk melakukan apa yang diperlukan untuk memastikan pengumuman/penerbitan penyata kewangan dalam masa tiga bulan dari tarikh pemberitahuan keputusan LC. Afrizan merayu pada Jawatankuasa Rayuan (AC) dengan alasan dia tidak perlu mematuhi syarat penyenaraian kerana setelah syarikat tersenarai digulung, syarikat itu akan segera dibatalkan dan peruntukan penggulungan Akta Syarikat 2016 ('Akta Syarikat') akan terpakai. AC membenarkan keputusan LC dengan alasan bahawa Bursa mempunyai kuasa dan budi bicara untuk tidak nyahsenarai Wintoni sementara menunggu proses akhir prosiding mahkamah yang mencabar perintah penggulungan dan selagi Wintoni kekal dalam senarai rasmi, Afrizan harus mematuhi dan memastikan pematuhan Wintoni dengan AMLR. Bursa kemudian mengumumkan teguran am Afrizan. Afrizan memulakan prosiding semakan kehakiman terhadap keputusan LC dan AC. Mahkamah Tinggi membenarkan relief-relief yang dituntut Afrizan, iaitu perintah *certiorari* terhadap Bursa untuk membatalkan keputusan LC dan AC dan perintah *mandamus* terhadap Bursa untuk mengumumkan bahawa teguran am terhadap Afrizan adalah tidak sah dan terbatal. Mahkamah Tinggi berpendapat, antara lain, bahawa (i) penyediaan penyata kewangan tertunggak yang diminta oleh Bursa tidak selaras dengan tugas berkanun pelikuidasi bawah Akta Syarikat; (ii) Afrizan, sebagai pelikuidasi yang dilantik oleh mahkamah, adalah ejen mahkamah dan tertakluk pada penyeliaan mahkamah berdasarkan s. 486 Akta Syarikat dan tidak harus melakukan apa yang berada luar ruang lingkup kuasanya dan tugas utamanya

adalah untuk menggulung perniagaan Wintoni; (iii) LOU adalah umum dan tidak menyatakan bahawa Afrizan akan menyiapkan penyata kewangan dan laporan berkaitan Wintoni; dan (iv) peraturan 16.11(2) AMLR adalah peruntukan wajib yang menetapkan bahawa Bursa "shall" membatalkan senarai Wintoni ketika mahkamah membuat perintah penggulungan. Mahkamah Rayuan, dalam menolak rayuan Bursa dan mengesahkan keputusan Mahkamah Tinggi, memutuskan bahawa keputusan LC dan AC dicemari dengan ketidakaturan, kekhilafan undang-undang dan tidak rasional sehingga keputusan tersebut terbuka pada semakan kehakiman. Mahkamah Rayuan berpendapat bahawa berdasarkan tafsiran harfiah per. 16.11(2) AMLR, tidak dapat dirundingkan bahawa peraturan tersebut menetapkan syarat-syarat wajib untuk nyahsenarai. Di hadapan mahkamah ini, kebenaran untuk merayu dibenarkan atas soalan-soalan berikut (i) adakah pematuhan keperluan penyenaraian konsisten dengan dan/atau dalam ruang lingkup kuasa pelikuidasi dan/atau tugas bawah Akta Syarikat atau sebaliknya dalam undang-undang ('soalan 1'); (ii) sama ada pada konstruksi/tafsiran peraturan/perenggan 16.11(2) yang betul tentang keperluan penyenaraian, Bursa tidak berkewajipan untuk dengan segera dan secara ringkas membatalkan senarai syarikat tersenarai apabila syarikat tersenarai dikenakan perintah penggulungan tanpa memerhatikan apa-apa rayuan/cabaran undang-undang untuk perintah penggulungan tetapi hanya boleh dilakukan setelah penentuan akhir mengenai rayuan/cabaran undang-undang ('soalan 2'); (iii) secara alternatif, sama ada Bursa berhak menggunakan budi bicaranya untuk mengubah dan/atau mengetepikan pematuhan peraturannya sendiri, termasuk peraturan/perenggan 16.11(2) Syarat Penyenaraian berdasarkan, antara lain, per. 2.07(2) AMLR dan perenggan 2.06(2) LR utama ('soalan 3'); (iv) sama ada pelikuidasi, sebagai orang yang mengawal pengurusan syarikat tersenarai dalam pembubaran, mesti laksanakan untuk terus mematuhi syarat penyenaraian sebagai pertimbangan untuk penyenaraian berterusan syarikat tersenarai dalam pembubaran ('soalan 4'); dan (v) sama ada pengarah dalam syarikat tersenarai dalam pembubaran dapat terus memastikan pematuhan keperluan penyenaraian oleh syarikat yang disenaraikan tanpa kebenaran pelikuidasi dan/atau mahkamah ('soalan 5').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) AMLR dikeluarkan menurut s. 378 Akta Pasaran Modal dan Perkhidmatan 2007 ('CMSA'). Jelas dari s. 378 CMSA bahawa kuasa untuk membuat peraturan tersebut diberikan oleh Parlimen kepada Suruhanjaya Sekuriti yang harus mendapatkan persetujuan Menteri agar peraturan tersebut dapat dilaksanakan. Oleh itu, AMLR timbul daripada undang-undang. AMLR berasal dari undang-undang dan dengan itu mempunyai kekuatan berkanun. Selain sifat AMLR yang

mengikat semua peserta dan pelabur di Bursa Saham Malaysia dan Bursa, terdapat hubungan kontrak yang terpisah dan bebas antara Bursa dan syarikat tersenarai iaitu Wintoni dan juga Afrizan sebagai orang yang mengendalikan Wintoni. Wintoni dan para pengarah, pegawai dan orang yang mengendalikannya secara kontrak terikat, antara lain, dengan peraturan-peraturan. Oleh itu, terdapat hubungan berkanun dan juga hubungan kontrak antara Bursa dan Afrizan.

(2) Persoalan inti di sini adalah sama ada Bursa terikat, secara tegar, untuk segera nyahsenaraikan sebuah syarikat yang tersenarai setelah pengumuman perintah penggulungan dibuat oleh Mahkamah Tinggi, menurut per. 16.11(2) AMLR. Masalah ini timbul kerana kata "shall" digunakan dalam per. 16.11(2) berbanding dengan "has a duty to" atau "must". "Shall" tidak mempunyai satu maksud yang tegas atau makna yang matan. "Shall" mengambil maknanya dari konteks di mana ia digunakan. Jelas dari per. 2 AMLR bahawa keseluruhan peraturan itu adalah permisif sehubungan dengan Bursa. AMLR diisytiharkan untuk memastikan kepatuhan perintah Bursa dalam melaksanakan fungsi pengawalseliannya. Tugas utama Bursa termaktub dalam s. 11 CMSA. Oleh itu, tidak mungkin ada pentafsiran undang-undang yang mencukupi atau tepat mengenai per. 16.11(2) tanpa memperhatikan fungsi utama Bursa sebagai pihak berkuasa yang tugas utamanya adalah untuk memastikan perlindungan pelabur awam. Peraturan ini, termasuk per. 16.11(2) AMLR, dibuat untuk memastikan kepatuhan dapat dilakukan demi kepentingan umum untuk memberikan perlindungan kepada pelabur. Untuk mentafsirkan perkataan 'shall' dalam per. 16.11(2) tanpa memerhatikan peruntukan-peruntukan lebih luas Peraturan secara keseluruhannya dan dalam konteks CMSA adalah satu kesalahan asas.

(3) Untuk menjawab persoalan bagaimana perkataan 'shall' dalam per. 16.11(2) AMLR ditafsirkan, adalah perlu untuk menetapkan peraturan dalam konteks CMSA dan tugas utamanya. Adalah tugas mahkamah untuk mentafsirkan peruntukan tertentu untuk memastikan niat badan perundangan dengan menganalisis makna sebenar Peraturan dalam konteks pembacaan holistik AMLR dan juga CMSA. Persoalan yang perlu dipertimbangkan adalah sama ada Bursa wajib nyahsenaraikan senarai syarikat dengan alasan per. 16.11(2) AMLR walau apa pun peruntukan yang dinyatakan s. 11 CMSA yang menghendaki Bursa bertindak (i) terlebih dahulu, demi kepentingan orang ramai untuk melindungi pelabur-pelabur; dan (ii) apabila kepentingan awam untuk perlindungan pelabur-pelabur bertentangan dengan undang-undang yang berkaitan dengan syarikat, perkara yang terdahulu diutamakan. Dalam situasi apabila bukan untuk kepentingan umum untuk melindungi pelabur agar syarikat tersenarai yang

digulung dinyahsenaraikan, adakah boleh per. 16.11(2) ditafsirkan sebagai menetapkan arahan undang-undang wajib yang diutamakan dari (i) selebihnya AMLR dibaca secara holistik; (ii) s. 11 CMSA; dan (iii) tujuan dan objek CMSA diambil secara keseluruhan. Jawapannya mestilah tidak. Penggunaan perkataan "shall" tidak selalu bermaksud dan digunakan secara mandatori. Terdapat beberapa keadaan di mana perkataan "shall" digunakan dengan cara yang tidak menandakan kewajipan undang-undang mandatori.

(4) Apabila perintah mahkamah mengisytiharkan bahawa syarikat tersenarai telah digulung, kebimbangan utama Bursa adalah memastikan bahawa terdapatnya kepatuhan berterusan terhadap peraturan-peraturan AMLR, supaya terdapat pendedahan berterusan mengenai cara kerja-kerja syarikat tersenarai, dan langkah-langkah yang diambil untuk memastikannya tetap beroperasi atau sebaliknya. Pendedahan sedemikian melalui pengembalian berkala merangkumi kaedah utama di mana pelabur akan diberitahu tentang apa yang sedang berlaku dalam entiti yang telah digulung, yang tetap kekal sebagai syarikat tersenarai. Oleh itu, pendedahan sedemikian sangat penting dan peraturan dibuat untuk mengatur hal yang sedemikian.

(5) Dalam situasi penggulungan, para pengarah tidak lagi mengawal aset dan operasi syarikat, yang diambil alih oleh pelikuidasi. Pelikuidasi memiliki aset perbadanan tersenarai dan mempunyai kawalan utama atas operasi dan aset syarikat. Atas sebab inilah keperluan penyenaraian dalam bentuk AMLR memerlukan pelikuidasi, sebagai orang baharu yang mengambil alih kawalan, untuk memastikan pematuhan berterusan. Kewujudan per. 2.22(1) AMLR itu sendiri membuktikan fakta bahawa selepas pengumuman perintah penggulungan berhubung dengan syarikat tersenarai, Bursa tidak terikat untuk menyahsenarai entiti tersebut dengan serta-merta. Jika ya, tidak akan ada peruntukan bagi orang yang mengawal perbadanan tersenarai yang telah digulung untuk memberikan pendedahan berterusan, kerana ini adalah berlebihan. Ini, seterusnya memperkukuh tafsiran "shall" sebagai bersifat tidak wajib, tetapi bersifat direktori, atas arahan Bursa.

(6) Oleh kerana Afrizan telah mematuhi per. 2.22(1), adalah kewajipannya, sebagai pelikuidasi, untuk memastikan kepatuhan AMLR, oleh sebab adanya peraturan tersebut, serta LOU khusus yang diberikan olehnya. Tidak boleh dipertahankan untuk pelikuidasi, sebagai orang yang mengendalikan syarikat tersenarai, untuk menangani isu itu sendiri dan menjalankan peraturan penyenaraiannya sendiri untuk menentukan bahawa dia tidak lagi mempunyai kewajipan pematuhan. Ini juga, dengan melakukan konstruksi sendiri

per. 16.11(1) dan 16.11(2), dan kemudian menyimpulkan bahawa kerana satu menyatakan "may" dan yang lain menyatakan"shall" masing-masing, per. 16.11(2) mesti dipatuhi oleh Bursa sehingga pelikuidasi tidak lagi memiliki kewajipan pematuhan. Lebih-lebih lagi, Afrizan terus melaksanakan secara unilateral konstruksi peraturannya sendiri, walaupun dia telah laksanakan LOU secara peribadi. Ini tidak dapat dipertahankan oleh pelikuidasi yang berhemah dan yang bertanggungjawab yang pasti menyedari cara kerja syarikat tersenarai dan kesan penggulungan terhadap kepentingan pelabur secara keseluruhan.

(7) Alasan yang juga penting untuk menyimpulkan bahawa istilah "shall" dalam per. 16.11(2) AMLR tidak menunjukkan, atau mewajarkan makna bahawa perkataan itu digunakan dalam bentuk satu kewajipan, adalah kesan atau akibat dari mentafsirkannya sebagai sifat wajib. Akibat dari mentafsirkan kata "shall" dalam peraturan tersebut sebagai arahan wajib, adalah bahawa setelah pengumuman perintah penggulungan oleh Mahkamah Tinggi, Bursa terikat untuk segera menyahsenaraikan syarikat yang disenaraikan tanpa peluang untuk memastikan asas penggulungan atau sama ada syarikat yang disenaraikan itu benar-benar bankrap atau telah digulung atas salah satu daripada beberapa asas lain yang dinyatakan dalam undang-undang penggulungan di bawah Akta Syarikat. Begitu juga fakta bahawa perintah itu mungkin tidak muktamad tetapi tertakluk pada cabaran undang-undang lebih lanjut yang dibenarkan untuk dipertimbangkan. Apabila ini digabungkan dengan pembacaan per. 16.11(2) AMLR sehingga syarikat yang disenaraikan juga segera dinyahsenaraikan, akibatnya kepada orang yang melabur juga agak merumitkan. Fakta penyahsenaraian akan memberi kesan langsung kepada semua pelabur yang telah melabur dalam syarikat tersenarai. Kerugian kepada pelabur tidak dapat diperbaiki. Sekiranya perintah penggulungan kemudian diakas atas rayuan atau ditangguhkan, maka penyahsenaraian sudah berlaku, tanpa peluang untuk mengakasnya, hanya kerana penyahsenaraian tidak boleh diakas. Syarikat tersenarai dan pelabur awam iaitu pemegang saham Wintoni akan mengalami kerugian yang tidak dapat diperbaiki. Status penyenaraian syarikat mempunyai nilai yang dilampirkan padanya. Nilai itu akan hilang secara tidak dapat ditarik balik jika penyahsenaraian dibuat serta merta mengikuti perintah penggulungan tanpa memberikan kesempatan kepada Bursa untuk menilai keadaan yang sama. Lebih penting lagi memandangkan tahap kerugian yang akan dialami oleh pelabur-pelabur awam dan syarikat tersenarai, pembacaan sedemikian bertentangan dengan kewajipan Bursa untuk melindungi kepentingan pelabur-pelabur awam. Fakta bahawa perintah penggulungan terhadap

Wintoni ditamatkan pada 17 September 2019 menggambarkan bahaya mengekang perkataan "shall" dalam *in vacuo* tanpa mempertimbangkan AMLR dan CMSA. Akibat membaca "shall" sebagai akibat wajib dari perintah penggulungan yang mampu diakas, sangat merumitkan.

(8) Peraturan 2.07(2) AMLR dan 2.06(2) keperluan penyenaraian utama membenarkan Bursa mengetepikan atau mengubah suai pematuhan dengan keperluan penyenaraian. Kesan peruntukan ini dalam AMLR adalah jelas, iaitu Bursa diberi kuasa untuk mengubah suai atau mengenepikan pematuhan peraturan apabila pematuhan tersebut tidak memenuhi kewajipan berkanunnya di bawah CMSA atau tidak mengikut semangat, niat dan tujuan AMLR. Dalam konteks sekarang, ini bermakna Bursa berhak untuk memutuskan untuk mengetepikan atau mengubah suai kesan per. 16.11(2), walaupun dibaca dalam bentuk yang paling ekstrem iaitu mengenakan kewajipan positif dan segera untuk menyahsenarai. Oleh itu, walaupun ini dibaca sebagai keperluan mandatori, Bursa tidak boleh dipersalahkan kerana memutuskan untuk tidak menyahsenarai perbadanan itu serta-merta, memandangkan kuasanya untuk mengimbangi keperluan untuk menyahsenarai terhadap kepentingan awam perlindungan pelabur-pelabur. Ini bermakna perkataan 'shall' tidak bersifat mandatori tetapi merupakan direktori, bermakna Bursa boleh menyahsenarai syarikat tersenarai selepas mengambil kira kepentingan berkaitan seperti yang digariskan dalam CMSA dan AMLR, pada masa yang sesuai, dan bukan serta-merta selepas pengumuman perintah penggulungan. Oleh itu, soalan 2 dan 3 telah dijawab secara afirmatif. Sehubungan itu, soalan 4 juga dijawab secara afirmatif. Oleh itu, tiada kewajipan atau obligasi di pihak Bursa untuk segera menyahsenarai syarikat apabila syarikat tersenarai diumumkan telah digulung. Berikutan itu, bahawa pelikuidasi sebagai orang yang mengawal bertanggungjawab untuk mematuhi seluruh peruntukan AMLR. Ini menjawab soalan 1.

(9) Pelikuidasi yang dilantik mahkamah ialah pegawai mahkamah yang mempunyai tugas dan fungsi yang jelas dan terang. Harus diikuti bahawa sebagai pegawai mahkamah, dia sedar dan mematuhi undang-undang. Standard tertinggi berkenaan pematuhan undang-undang diperlukan daripadanya. Memandangkan peruntukan nyata CMSA, yang pasti diketahui oleh pelikuidasi, semasa dia menjalankan pembubaran sebuah syarikat tersenarai, dia sepatutnya sedar sepenuhnya bahawa peruntukan CMSA mengatasi peruntukan undang-undang berkaitan dengan perbadanan di mana kepentingan awam dalam bentuk perlindungan pelabur yang perlu diberi perhatian. Dengan demikian, dan memandangkan LOU yang telah dilaksanakannya, jelas bahawa pelikuidasi terikat dengan undang-undang seperti yang dinyatakan dalam, antara lain, CMSA dan AMLR. Peruntukan-

peruntukan LOU yang jelas menjadikan ini nyata di luar pertikaian. Ia menyatakan bahawa dengan mempertimbangkan Bursa yang membolehkan Wintoni tetap disenaraikan dan dalam senarai rasmi, dia sebagai pelikuidasi, berjanji dan bersetuju untuk mematuhi AMLR dan apa-apa pindaan yang sama yang terpakai padanya. Untuk mencuba mengelakkan kewajipan pendedahan yang jelas dan tegas untuk kepentingan Wintoni dan masyarakat pelabur, dengan menunjukkan bahawa Bursa terikat untuk nyahsenaraikan Wintoni dengan membebaskannya dari sebarang keperluan untuk mematuhi LOU, adalah tindakan yang tidak dapat diterima oleh pegawai mahkamah, dari mana standard integriti tertinggi diharapkan. Telah dihujahkan untuk Afrizan bahawa penggunaan kata-kata "in so far as the same apply to me" membebaskannya dari kewajipan untuk mematuhi LOU. Namun, kata-kata itu tidak dapat mengatasi tugas berkanunnya sebagai pelikuidasi untuk memenuhi keperluan ini.

(10) Soalan 5 berkaitan dengan sama ada pengarah syarikat tersenarai dalam pembubaran dapat terus memastikan kepatuhan AMLR apabila tiada kebenaran oleh pelikuidasi atau mahkamah. Jawapan untuk soalan ini adalah negatif kerana pengarah tidak dapat memberikan pendedahan yang diperlukan seperti yang ditetapkan bawah AMLR atau syarat-syarat penyenaraian utama tanpa persetujuan, kebenaran atau kelulusan pelikuidasi iaitu orang yang mengawal syarikat tersenarai dalam pembubaran. Oleh itu, dia tidak mempunyai asas untuk memberikan pendedahan tersebut. Adalah tugas orang yang berkuasa, iaitu pelikuidasi, untuk memberikan pendedahan tersebut. Pelikuidasi berada dalam kedudukan untuk mendapatkan maklumat yang relevan dari para pengarah atau mengarahkan mereka untuk memberikan pendedahan yang diperlukan kepada Bursa. Adalah kewajipan pelikuidasi untuk meminta para pengarah membuat pendedahan yang diperlukan selaras dengan AMLR di mana dia tidak dapat melakukannya secara peribadi kerana dia tidak dapat melakukannya atau tidak mempunyai pengetahuan yang relevan. Ini adalah kewajipan undang-undang yang harus dilakukannya, selaras dengan keperluan untuk mematuhi peruntukan-peruntukan undang-undang bawah Akta Syarikat, CMSA dan AMLR. Oleh itu, soalan 5 dijawab secara negatif.

Case(s) referred to:

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Australian Securities and Investments Commission (ASIC) v. Dunner (2013) 303 ALR 98 ***(refd)***

Benjamin William Hawkes v. PP [2020] 8 CLJ 267 FC ***(refd)***

Fai Insurance Ltd v. Pioneer Concrete Services (No 2) 1986 10 ACLR 801 ***(refd)***

FAI Insurances Ltd & Anor v. Pioneer Conrete Services Ltd & Ors (No. 2) 10 ACLR 80 ***(refd)***

Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***

Re Contract Corporation (Gooch's Case) (1871) LR 7 Ch App 207 ***(refd)***
State of Haryana v. Anrv Raghubir Dayal (1995) 1 SCC 133 ***(refd)***
Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals [2012] 3 CLJ 837 CA ***(refd)***
Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd [2011] 7 CLJ 215 HC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal [2012] 8 CLJ 678 CA ***(refd)***
Yeo Ann Kiat & Ors v. Hong Leong Bank Bhd & Anor [2016] 9 CLJ 207 CA ***(refd)***
Yeoh Eng Kong v. Dato' Nik Ismail Nik Yusoff & Ors [2017] 7 CLJ 369 HC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, ss. 11(2), 21(1), 360, 378
Companies Act 2016, s. 486
Contracts Act 1950, ss. 24, 47
Interpretation Acts 1948 and 1967, ss. 17A, 54(2)
Rules of the High Court 1980, O. 53

For the appellant - Khoo Guan Huat, Preetha Pillai, Nimalan Devaraja, Tiang Wen En; M/s Skrine
For the respondent - Sukhwinder Singh; M/s Sukhwinder Singh N Mahinder Singh

[Editor's note: For the Court of Appeal judgment, please see Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain [2021] 8 CLJ 675 (overruled); For the High Court judgment, please see [2020] 1 LNS 1133 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan FCJ:

[1] This entire appeal turns on what is perhaps one of the most misused words in all legal language namely "shall". Here it is the use of the word "shall" in r. 16.11(2) of the ACE (access, certainty, efficiency) Market Listing Requirements ("AMLR" or "rules") that has given rise to the present conundrum before us.

[2] The salient facts are not in dispute and are set out below.

Background Facts And Decisions Of The Courts Below

[3] On 17 August 2017, the KL High Court wound up Wintoni Group Berhad ("Wintoni"), a listed corporation on the ACE Market of the appellant, Bursa Malaysia Securities Berhad ("Bursa"). The respondent, Mohd Afrizan bin Husain ("Afrizan") was appointed as the liquidator of Wintoni in the winding-up order.

[4] On 20 September 2017, Afrizan provided a letter of undertaking ("LOU") to Bursa pursuant to r. 2.22 of the ACE (Access, Certainty, Efficiency) Market Listing Requirements ("AMLR") to the effect that in consideration of Bursa allowing the continued listing of Wintoni on the official list, he would comply with the AMLR (including any amendment) applicable to him.

[5] However, on 31 October 2017, Afrizan issued a general announcement stating that he would not prepare Wintoni's annual report that includes the annual audited financial statements together with the auditors' and directors' reports for the financial year ended 31 December 2016 and any financial statements for any subsequent financial periods.

[6] On 13 March 2018, Bursa conducted an inquiry in relation to the delay in announcement of Wintoni's quarterly reports for the financial period ended 30 September 2017 and 31 December 2017 (due on 30 November 2017 and 28 February 2018 respectively).

[7] Through emails on 15 March 2018 and 21 March 2018, Afrizan took the stand that as Wintoni had ceased operations, he would not prepare the relevant financial statements. He had not delegated compliance with the AMLR to the directors and did not arrange for the directors and/or management or any agent to comply with the AMLR.

[8] On 10 October 2018, Bursa issued a requisite notice together with a Listing Committee (LC) memo, giving notice to Afrizan on the proposed enforcement action against him and specifying the nature and particulars of his breach of the AMLR. In his response dated 9 November 2018, Afrizan reiterated his earlier stance.

[9] On 15 November 2018, the LC deliberated on the facts and evidence presented to them, including Afrizan's representations and found that he had breached the AMLR. The LC imposed a public reprimand on him and directed him to do the necessary to ensure announcement/issuance of the financial statements (collectively referring to annual reports for the financial year ended 31 December 2016 and 31 December 2017 and the quarterly reports for the financial period ended 30 September 2017, 31 December 2017, 31 March 2018 and 30 June 2018) and any other outstanding financial statements, within three months from the date of notification of the LC's decision.

[10] On 11 January 2019, Mohd Afrizan appealed to the appeals committee (AC) on the ground that he did not have to comply with the Listing Requirements as once a listed corporation is wound up, it will immediately be de-listed and the winding-up provisions of the Companies Act 2016 would be applicable.

[11] The AC *vide* letter dated 6 May 2019 upheld the LC's decision on the basis that Bursa had the power and discretion not to de-list Wintoni pending final disposal of court proceedings challenging the winding-up order and as long as Wintoni remained on the official list, Afrizan was bound to comply and to ensure Wintoni's compliance with the AMLR. On the same date, Bursa announced Mohd Afrizan's public reprimand.

[12] Afrizan instituted judicial review proceedings in respect of the decisions of the LC and the AC. Leave was granted on 4 September 2019.

[13] In the meantime, on 17 September 2019, pursuant to a consent judgment (Post-Companies Winding Up No. WA-28PW-507-11-2018), Wintoni's winding up was terminated by the Kuala Lumpur High Court and Afrizan ceased to be Wintoni's liquidator.

[14] On 15 June 2020, the High Court granted Afrizan the reliefs sought, namely an order of *certiorari* against Bursa to strike out the decisions of the LC dated 18 December 2018 and the AC dated 6 May 2019; a mandamus order against Bursa to announce that the public reprimand against Afrizan is null and void within 14 days from the date of the court order; and ordered Bursa to pay Afrizan costs of RM8,000.

[15] In brief, the High Court was of the view that:

(i) preparation of the outstanding financial statements requested by Bursa is inconsistent with the statutory duties of the liquidator under the Companies Act 2016. This is the responsibility of the company directors even though the liquidator has been appointed so Bursa should have sought the outstanding financial statements from them instead of from Afrizan. Bursa was clearly acting unreasonably and without legal basis;

(ii) Afrizan, as a court-appointed liquidator, is an agent of the court and subject to the court's supervision pursuant to s. 486 of the Companies Act 2016. He cannot do what is outside the scope of his powers and his primary duty is to wind up the business of Wintoni;

(iii) the LOU is general and does not specify that Afrizan is to prepare Wintoni's financial statements and related reports. Afrizan also averred that the LOU was a condition of gaining access to Bursa's website for the making of public announcements in relation to Wintoni when necessary;

(iv) the LOU is null and void pursuant to s. 24 of the Contracts Act 1950 as it is not in accordance with legal provisions and principles;

(v) rule 16.11(2) of the AMLR is a mandatory provision stipulating that Bursa "shall" de-list Wintoni when the court makes the winding-up order. This provision is clearly distinguishable from the discretionary provision of r. 16.11(1) of the AMLR which uses the word "may";

(vi) it is important that listed corporations which have been issued with a winding-up order such as Wintoni, be de-listed in order to protect investors and prospective investors.

[16] On 3 August 2020, Bursa obtained a stay of execution of the High Court order until the disposal of their appeal to the Court of Appeal.

[17] On 20 January 2021, the Court of Appeal unanimously dismissed Bursa's appeal and affirmed the decision of the High Court. The Court of Appeal also granted an interim stay to Bursa, pending filing of a formal application within seven days.

[18] The Court of Appeal agreed with the High Court's views and held that the LC and AC decisions are tainted with illegality, error of law and irrationality such that the said decisions are amenable to judicial review. The issues before the Court of Appeal were the effect of r. 16.11(2) of the AMLR and of Afrizan's LOU. On the former, the Court of Appeal held that upon a literal interpretation of the said rule, it is non-negotiable that the said rule stipulates mandatory requirements for de-listing. Further, Bursa cannot rely on r. 2.07(2) to waive a mandatory requirement of the AMLR.

[19] On the latter issue, the Court of Appeal held that Afrizan's LOU was qualified by the words "insofar as the same apply to me" and since he had no duty to ensure Wintoni's timely issuance of financial statements, he was not in breach of the AMLR.

[20] By a consent order recorded in the Court of Appeal on 12 July 2021, parties agreed to stay the execution of the mandamus order in para (b) of the High Court order affirmed by the Court of Appeal (which ordered Bursa to announce that the public reprimand against Afrizan is null and void within 14 days from the date of the court order).

The Federal Court

[21] On 29 June 2021, the Federal Court allowed leave to appeal on the following questions:

(i) Whether compliance with the Listing Requirements is consistent with and/or within the scope of the liquidator's powers and/or duties under the Companies Act 2016 or otherwise in law.

(ii) Whether on a proper construction/interpretation of rule/para. 16.11(2) of the Listing Requirements, Bursa Securities is not obliged to immediately and summarily de-list a listed corporation upon the listed corporation being served with a winding-up order without regard to any appeals/legal challenges to the winding-up order but should only do so upon a final determination on the said appeals/legal challenges.

(iii) Alternatively, whether Bursa Securities is entitled to exercise its discretion to modify and/or waive compliance of its own rules, including rule/para. 16.11(2) of the Listing Requirements by virtue of, amongst others, r. 2.07(2) of the AMLR and para. 2.06(2) of the main LR.

(vi) If:

(a) the answer to question 1 is in the affirmative; and

(b) the answer to questions 2 and/or 3 is in the affirmative whether the liquidator, as the person in control of the management of a listed corporation in liquidation, must undertake to continue to comply with the Listing Requirements as consideration for the continued listing of a listed corporation in liquidation.

(v) Whether a director in a listed corporation in liquidation can continue to ensure compliance of the Listing Requirements by the listed corporation without the authorisation by the liquidator and/or court.

[22] We heard the appeal on 5 January 2022. Before us, Bursa's counsel submitted that the heart of the matter would be Q2 & Q3 with the remaining Q1, Q4 & Q5 dealt with separately. Bursa's counsel proposed that Q1 to Q4 ought to be answered in the affirmative and Q5 be answered in the negative.

[23] On the other hand, Afrizan's counsel submitted that the heart of the matter would be Q1 & Q5. Afrizan's counsel proposed that Q5 ought to be answered in the affirmative and Q1 in the negative. Q2 & Q3, it was submitted, should be answered in the negative, while Q4 was academic.

[24] Counsel for Bursa put forward twofold submissions before us, namely that:

(i) rule 16.11(2) of the AMLR does not necessarily result in mandatory de-listing; and

(ii) alternatively, if the court was not with Bursa on (i) above, such de-listing, even if mandatory, does not have to be immediate.

[25] Counsel for Bursa explained that if de-listing was immediately effected, the de-listed company would no longer be in a position to trade on the exchange, and the inherent value of the listing would be lost. In order to get re-listed, the company would have to submit a fresh application for listing. That could take up to two years as listing is a lengthy process.

[26] Counsel for Bursa emphasised that besides owing duties to the shareholders and protecting the investing public, Bursa also owed duties to the wider public as de-listing a company would have a knock-on effect on other listed companies that are related or connected to the de-listed company as the shares of these related or connected listed companies might also be affected.

[27] Counsel for Afrizan was more concerned with the liability of his client. He placed on record that he had no quarrel with Bursa's power to de-list a company. He submitted that r. 16.11(2) is mandatory in nature, but accepted that it does not prescribe any time limit for de-listing a company that has been wound up. Where no time is stipulated for performance, it ought to be done with all convenient speed. (See s. 47 of the Contracts Act 1950 and s. 54(2) of the Interpretation Acts 1948 and 1967 ("Interpretation Acts"). However, despite this submission, counsel for Afrizan stated that he accepted that it was up to the wound-up company to take whatever steps it saw fit to challenge its winding up, and for all legal avenues to be exhausted. If still unsuccessful, then Bursa could de-list.

[28] Counsel for Afrizan also contended that his client did not have to comply with the AMLR under the LOU, which was a qualified LOU, and that it is the obligation of the directors to comply with the AMLR. This contention was maintained despite reliance by Bursa on the case of *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals* [2012] 3 CLJ 837; [2012] 6 MLJ 182 that held that the powers of a director cease on appointment of a liquidator. Counsel was not able to provide the court with authority to the effect that a liquidator is exonerated because directors still retain the duty to comply with the AMLR, post-liquidation.

Reasons For Our Decision

[29] The appeal was allowed for the following reasons.

What Is The Nature Of The Listing Rules?

[30] In order to comprehend the nature of the listing rules, it is necessary to have regard to the source of the AMLR. The AMLR is issued pursuant to s. 378 of the Capital Markets and Services Act 2007 ("CMSA") which provides as follows:

> **Power to make regulations**
>
> (1) The Commission may, with the approval of the Minister, make such regulations as may be necessary or expedient for:
>
> (a) giving full effect to the provisions of this Act;
>
> (b) carrying out or achieving the objects and purposes of this Act; or
>
> (c) the further, better or convenient implementation of the provisions of this Act.
>
> **(2) Without prejudice to the generality of sub-s. (1), regulations made under this section may provide for:**
>
> (a) forms for the purposes of this Act;
>
> (b) fees to be paid for the purposes of this Act;
>
> **(c) the regulation of the purchase and sales of capital market products;**

(d) the standards with respect to the qualification, experience and training of licensed person and directors of public listed corporations;

(e) the conduct of business on a stock exchange, derivatives exchange or approved clearing house; or

(f) the exemption of any specified person or any person who is a member of a specified class of persons from any of the provisions of this Act, subject to terms and conditions.

(emphasis added)

[31] It is apparent from s. 378 of the CMSA that the power to make such regulations is conferred by Parliament on the securities commission which must obtain the approval of the Minister in order for the regulations to take effect. The AMLR, therefore, trace their roots back to statute. In other words, the AMLR are of statutory origin and therefore have statutory force.

[32] This conclusion is strengthened by the fact that there is recourse to the courts, expressly provided for in s. 360 of the CMSA, which provides as follows:

Power of court to make certain orders

(1) Where:

(a) ...

(b) ...

(c) on an application by an exchange holding company, a stock exchange, a derivatives exchange or an approved clearing house, as the case may be, it appears to the court that:

(i) any person has contravened a relevant requirement; or

(ii) any person has contravened a relevant requirement and that there are steps which could be taken for remedying the contravention or mitigating the effect of such contravention; or

(d) …

the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:

(A) …

(B) …

(C) …

(D) …

(E) …

(F) …

A (G) …

(H) …

(I) …

(J) *where a person has refused or failed, is refusing or failing, or is proposing to*
B *refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring such person to do such act or thing;*

(K) …

(L) …

C (M) …

(N) …

(O) …

(P) …

D (2) If an application is made to a court for an order under subsection (1), the court may, if in its opinion it is desirable to do so, before considering the application, make an interim order of the kind applied for and such order shall be expressed to have effect pending the determination of the application.

E ...

(4) Where an application is made to the court for an order under paragraph (1)(J), the court may grant the order:

(a) where the court is satisfied that the person has refused or failed to do the required act or thing, whether or not it appears to the court that the person
F *intends to again refuse or fail, or continue to refuse or fail, to do the required act or thing; or*

(b) where it appears to the court that in the event that such an order is not granted, it is likely that the person will refuse or fail to do the required act or thing, whether or not the person has previously refused or failed to do the act or thing and whether or not there is any imminent risk of damage to any person if
G *the person required to do such act or thing refuses or fails to do so.*

….

(10) A person who contravenes:

(a) an order under subsection (1) that is applicable to him;

H (b) ...

(c) ...

commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding
I ten years or to both.

(11) ...

(12) The court may rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

(13) For the purposes of this section, "relevant requirement":

(a) in relation to an application by the Commission under this section, means a requirement:

(i) which is imposed by or under this Act or any securities laws;

(ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws;

(iii) *which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house*; or

(iv) which is imposed by or under any other law and the contravention of which constitutes an offence which the Commission has the power to prosecute with the consent in writing of the Public Prosecutor.

(b) in relation to an application by the exchange holding company, a stock exchange, a derivatives exchange or an approved clearing house, means a requirement which is imposed by or under the rules of the stock exchange, the derivatives exchange or approved clearing house, as the case may be; and

(c) in relation to an application by the aggrieved person, means a requirement:

(i) which is imposed by or under this Act;

(ii) *which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws*; or

(iii) *which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house*.

(14) An application made pursuant to this section shall not prejudice any other action that may be taken by the Commission, exchange holding company, stock exchange, derivatives exchange, approved clearing house or aggrieved person, as the case may be, under any securities laws or any other law or rules.

(emphasis added)

[33] Section 360 is extensive and provides the requisite basis for the provisions of the CMSA to be fully complied with. When the provisions of the CMSA are construed holistically, particularly ss. 378 and 360, it follows that these provisions read together give statutory recognition and significance to the AMLR. The AMLR, therefore, have statutory force. We are fortified in our conclusions by the following case law from Malaysia and Australia.

A **Malaysia**

[34] In the High Court case of *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd* [2011] 7 CLJ 215; [2012] 7 MLJ 85, the applicant applied for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of Bursa's appeals committee imposing the punishment of public reprimand and fine of RM43,000 on the applicant for breach of Bursa's Listing Requirements. Aziah Ali J dismissed the application. In doing so, she stated that the Listing Requirements have statutory force, referring to the Australian case of *Fai Insurance Ltd v. Pioneer Concrete Services (No 2)* 1986 10 ACLR 801:

> [18] It is submitted that *the LR which is derived from the CMSA has statutory force* (s. 354 of the CMSA; *Fai Insurance Ltd v. Pioneer Concrete Services (No 2)* 1986 10 ACLR 801). Therefore the duties of the directors, ie the applicants herein, under the LR, are in fact statutory duties which are imposed on them as long as the company is listed. The appointment of the PL cannot by itself, in the absence of any such provision within the CMSA or any other Act, absolve the directors from their obligations under the LR.
>
> ....
>
> [30] Counsel for the applicants rightly submits that *in pursuance of s. 11 of the CMSA, the respondent drew up rules as contained in the LR to regulate the conduct and activities of its members. I agree with counsel for the respondent that the LR has statutory force and the duties imposed by the LR upon the applicant are statutory duties in view of the fact that the LR is derived from the CMSA*.
>
> (emphasis added)

[35] That decision, on appeal, was affirmed by the Court of Appeal in *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals* [2012] 3 CLJ 837 ("*Lamin*"). The Court of Appeal expressly agreed that the Listing Requirements have statutory force:

> [23] At the outset, we must stress that **the LR has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the Capital Markets and Services Act 2007**.
>
> (emphasis added)

[36] *Lamin* (above) was referred to in other cases including the Court of Appeal case of *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* [2012] 8 CLJ 678; [2013] 1 MLJ 158 where Ramly Ali JCA (as he then was) stated:

> [27] **The LR has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the relevant laws particularly the CMSA 2007**. A listed issuer and its directors must comply with the LR for so long as the listed issuer shall remain on the official list of the stock exchange. These duties are owed not only to the respondent but also to the investing public. This has

been stressed by the learned Low Hop Bing JCA, delivering the judgment of the Court of Appeal in the case of *Tan Sri Dato' Haji Lamin bin Haji Mohd Yunus v. Bursa Malaysia Securities Berhad* [2012] 3 CLJ 837; [2012] 6 MLJ 182.

(emphasis added)

Australia

[37] In the case referred to by Aziah Ali J in *Lamin* (above), *FAI Insurances Ltd & Anor v. Pioneer Concrete Services Ltd & Ors (No. 2)* 10 ACLR 80, the Court of Appeal of New South Wales considered the extent of the jurisdiction to remedy an irredeemable breach of the official Listing Requirements of the Australian associated stock exchanges. In the course of the judgements of the courts, there was consideration of the nature of the Australian listing rules.

[38] In the course of the first instance judgement, there was commentary made on the nature and mode of construction of the Listing Requirements in Australia. Young J, who sat at the first instance, held that the listing requirements are "flexible guidelines for commercial people to be policed by commercial people", not "inflexible rules" to be "treated as technical documents for construction in the same way as a statute."

[39] Young J then went on to find that the courts could not find breach of listing requirements as that fell solely within the purview of the exchange. On appeal however, this finding was reversed by the appeal court judges.

[40] Street CJ expressly disagreed with the proposition that the court could not ensure compliance when the Listing Requirements had been breached and only the exchange could. He held *inter alia* as follows:

Whilst I recognise the importance of enabling the stock exchange to impose requirements upon listed companies according to ordinary and proper commercial standards, ss. 42 and 14 confer on the court jurisdiction to underwrite the binding nature of the stock exchange rules. The obligation to comply with them is expressly imposed by s. 42(2) and the jurisdiction conferred by s. 42(1) and by s. 14(1) imposes upon the court a complementary responsibility to hold itself ready, in appropriate cases, to underwrite and enforce that binding significance. …

(emphasis added)

[41] And in a separate concurring judgment, Kirby P stated *inter alia* as follows:

Under s. 31 of the Securities Industry Act 1975 it was necessary to establish, outside the section, a contractual or statutory obligation to observe the listing requirements. But s. 42 of the Securities Industry Code imposes its duties more clearly. *By the force of the section it gives statutory recognition and significance to the listing requirements of the securities exchange.*

…

A Thirdly, *his Honour has taken too narrow a view of the purpose and operation of s. 42. His references to the listing requirements as being a "flexible set of guidelines for commercial people to be policed by commercial people … [which] are never intended to be inflexible rules but rather principles to be administered and applied by an expert body in accordance with the prevailing ethos of those chosen to administer them", undervalues the special statutory status now accorded to them by* B *both ss. 14 and 42 of the Securities Industry Code. ... The terms of s. 42(2) provide another indicium of the legislative intention to afford a wide facility to courts to frame orders which secure compliance with those listing requirements.*

(emphasis added)

C **[42]** In this jurisdiction, while our statutory provisions under the CMSA are not *pari materia* with the Australian statutory provisions prevailing then (or even now), the underlying legal rationale in the cases is the same. And that legal rationale is that the existence of a specific enforcement statutory provision in the CMSA, namely s. 360, gives statutory recognition and status to the AMLR. Put another way, Parliament by enacting s. 360 of the CMSA D has statutorily ensured that compliance with the AMLR is effected, where necessary by the courts. And because such enforcement is effected through statute, the AMLR enjoys statutory force.

[43] In conclusion, the Listing Requirements have statutory force by reason E of their source as well as the power and jurisdiction of the courts to enforce the AMLR in appropriate cases.

[44] Apart from the statutory nature of the AMLR which binds all participants and investors in the Malaysian Stock Exchange and Bursa, there is a separate and independent contractual relationship between Bursa and the F listed corporation, *ie*, Wintoni, as well as Afrizan as the person in control of Wintoni. Wintoni and the directors, officers and persons having control of it are contractually bound by, *inter alia*, the regulations.

[45] There is, therefore, both a statutory relationship as well as a contractual relationship between Bursa and Afrizan.

G **How Are The Listing Requirements To Be Construed?**

The Proper Construction To Be Accorded To Rule 16.11(2) Of The AMLR

[46] The primary issue that falls for consideration here is the construction of r. 16.11(2) of the AMLR at encl. 20 p. 271, the salient parts of which read H as follows:

Delisting by the Exchange

(2) The Exchange shall de-list a listed corporation in any one of the following circumstances:

I (a) pursuant to a directive, requirement or condition imposed by the SC, after which the Exchange will notify the SC of the decision to de-list;

(b) .....

(c) ....

(d) Upon a winding up order being made against a listed corporation.

[47] A reading of sub-para. (d) shows that the de-listing is to be effected by Bursa upon a winding-up order being made. A plain or grammatical reading of r. 16.11(2) of the AMLR where the words in sub-para. (d) are taken *in vacuo*, or by focusing solely on sub-para. (d) and ignoring the rest of the provisions of the AMLR as well as the CMSA, would result in a construction that at the point when the winding-up order is pronounced, the company will be de-listed.

[48] The question or issue that then follows is whether it is correct to construe a provision like r. 16.11(2) such that the text is read or interpreted grammatically, and *in vacuo*, without consideration of the surrounding words and purpose and object of the AMLR and the CMSA? Namely with no consideration for context?

[49] We have previously concluded that the AMLR has statutory force. As such the provisions of the AMLR should be construed within the purview of, and in accordance with the principles and objectives of the CMSA. This is particularly so given that the CMSA comprises the source of the AMLR. In order to do so, it is necessary to first, construe the CMSA, the statutory interpretation of which is governed by s. 17A into the Interpretation Acts 1948 and 1967.

[50] Malaysian law requires that the interpretation of an Act be undertaken with the purpose and object of the Act in mind. Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Please see also *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 ("*Tebin*'s case").

[51] It is clear from the wording of s. 17A that any reading which is purely textual, as opposed to contextual, is to be rejected.

[52] Once the statutory purposive approach is applied, it then becomes necessary to ascertain what r. 16.11 of the AMLR means in the context of the CMSA because, as mentioned above, the AMLR is an instrument drafted and implemented for the purpose of effecting compliance with the CMSA.

[53] This, in turn, requires a consideration of s. 11 of the CMSA which stipulates that the primary duty of Bursa is to ensure an orderly and fair market in the securities that are traded through its facilities. In order to carry out its duty Bursa is bound to:

(i) firstly, act in the public interest having regard to the need for the protection of investors; and

(ii) where such interests conflict with that of the law relating to corporations, the former, namely the need to act in the public interest for the protection of investors, prevails.

[54] It then becomes the duty of Bursa "to take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with its rules".

[55] Therefore, the primary function of Bursa, is to act in the public interest having regard to the need for the protection of investors. And the purpose of these regulations ties back to the duty of Bursa to, under s. 11(2) of the CMSA, "ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or derivatives that are traded through its facilities." This primary duty of Bursa to the public is also echoed in s. 21(1) of the CMSA which requires the maintenance of an orderly and fair market in relation to securities which are traded on the market. The primary function of Bursa is in this context to act in the public interest to protect investors.

[56] In brief, the CMSA contains comprehensive and holistic provisions for Bursa to regulate the market and enforce the requirement for an orderly and fair market in various sections of the CMSA. How then are regulations such as the AMLR to be construed and what is their effect?

[57] The core question here is whether the Bursa is bound, rigidly, to immediately delist a listed corporation upon the pronouncement of an order of winding up by a High Court, pursuant to r. 16.11(2) of the AMLR? Is that the sole and proper construction to be accorded to the said rule?

[58] This issue only arises by reason of the word "shall" utilised in r. 16.11(2). In this context, it should be noted that the word used is "shall" as opposed to "has a duty to" or "must". *Black's Law Dictionary* lists the following five meanings of "shall":

(i) has a duty to; (this is the mandatory sense that drafters typically intend that that courts typically uphold).

(ii) should;

(iii) may;

(iv) will; and

(v) is entitled to.

[59] Therefore, "shall" does not have a single firm or settled meaning. It takes its meaning from the context in which it is used. The Court of Appeal, in immediately construing the word "shall" as imposing a mandatory, statutorily imposed obligation, without undertaking any form of interpretation of the AMLR in the context of the primary legislation, erred in law. The Court of Appeal ought to have undertaken the task of comprehending what is meant by "shall" in r. 16.11(2)(b) of the AMLR in the context of a holistic reading of the AMLR as well as the CMSA.

[60] While it is true that the use of "shall" is often mandatory and "may" is permissive, that is not the beginning and end of statutory construction. That is a limited approach which is incorrect if confined solely to that consideration and conclusion. Instead, it is imperative that the court construes the word "shall" in the context of the entirety of r. 16.11(2), the AMLR and finally the CMSA. In short, "shall" is to be construed in the broader statutory context set out above.

[61] What is the "broader" statutory context? The broader statutory context requires a consideration of whether the stated rule, when considered in the context of both the AMLR and the CMSA, makes provision for a mandatory or permissive directive. Put another way, the broader issue turns on whether the statutory directive itself is mandatory or permissive.

[62] In this context, it is clear from r. 2 of the AMLR that the entirety of the rules is permissive in relation to Bursa. As stated earlier, the AMLR was promulgated to ensure compliance at the behest of Bursa in the exercise of its regulatory function. The primary duty of Bursa is encapsulated in s. 11 of the CMSA. As such there can be no adequate or proper statutory interpretation of r. 16.11(2) without having regard to the primary function of Bursa as a regulatory authority whose primary duty is to ensure public investor protection. In other words, these rules, including r. 16.11(2) AMLR, are made to ensure compliance can be effected in the public interest of providing investor protection. So, to now construe the word "shall" in r. 16.11(2) without having any regard to the wider provisions of the rules holistically and in the context of the CMSA is a fundamental error.

[63] As both the High Court and the Court of Appeal failed to undertake this exercise adequately or at all, we are bound to reconsider the issue afresh. In order to answer the question of how the word "shall" in r. 16.11(2) of the AMLR is to be construed, it is necessary to construe the rule in the context of the CMSA and its primary duties. It is the duty of the court to construe the particular provision to ascertain the intention of the legislature by analysing the true meaning of the rule in the context of a holistic reading of the AMLR as well as the CMSA, as stated earlier.

[64] As stipulated in *Crawford on the Construction of Statute*s: "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other ...".

[65] In *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 Syed Agil Barakbah SCJ held that: "... No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the Legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other."

[66] And in *Benjamin William Hawkes v. PP* [2020] 8 CLJ 267; [2020] 5 MLJ 417 (FC) it was said at para. 46 in relation to the use of the word "shall":

> ... Applying the principles as enunciated in the aforesaid cases, whether the word "shall" in a particular legislation is mandatory or directory depends upon the intention of the Legislature in question which is ascertained by looking at the whole scope of the statute to be construed. The use of the word "shall" would not by itself make a provision of the Act mandatory. It is to be construed with reference to the scheme of the statute and the context in which it is used. In *Cheong Seok Leng v. PP* [1988] 2 MLJ 481 at 489 Chan Sek Keong JC (as he then was) explained the relevant rules of interpretation to be given to the word "shall" which appears in legislation as follows:
>
> ...
>
> [48] The purposive rule of interpretation must be adopted in interpreting s. 51A of the CPC, pursuant to s 17A of the Interpretation Acts 1948 and 1967 which read as follows:
>
> > 17A Regard to be had to the purpose of the Act
> >
> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> [49] It is clearly untenable in this case to allude to the word 'shall' as mandatory, thus stultifying the justice of the case, when a document was not delivered to the accused persons before the commencement of the trial.

[67] In the Supreme Court of India's decision in *State of Haryana v. Anrv Raghubir Dayal* (1995) 1 SCC 133 it was held at para. 5:

> 5. The use of the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment or consequences to f low from such construction would not so demand. Normally, the word "shall" *prima facie* ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word "shall" therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word shall; as mandatory or as directory accordingly. Equally it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or the general public, without very much furthering of the object of the Act, the same would be construed as directory.

[68] Distilling from the general position in law further, the question for consideration is whether Bursa is mandatorily bound to de-list the company by reason of r. 16.11(2) of the AMLR notwithstanding the express provisions of s. 11 of the CMSA which require that Bursa acts:

(i) firstly, in the interests of the public for the protection of investors; and

(ii) secondly, that where the public interest for the protection of investors conflicts with the law relating to corporations, the former prevails.

[69] Put another way, in a situation where it may not be in the public interest for the protection of investors for a wound up listed company to be de-listed, is it tenable to construe r. 16.11(2) as prescribing a mandatory statutory directive that prevails over:

(i) the rest of the AMLR read holistically;

(ii) section 11 of the CMSA; and

(iii) the purpose and object of the CMSA taken as a whole.

[70] The answer must be no.

[71] The use of the word "shall" does not always mean that it is being used mandatorily, as expressly elucidated in the case – law above. There are numerous instances where the word "shall" is used in a way that does not denote a mandatory legal obligation. (As Bryan Garner, the legal writing scholar and editor of *Black's Law Dictionary* noted – "In most legal instruments, shall violates the presumption of consistency ... which is why shall is among the most heavily litigated words in the English language.")

[72] In point of fact, "shall" has come to be the most misused word in the legal language.

The Purpose And Object Of The AMLR

[73] In order to comprehend the context in which the word "shall" ought to be construed it is also necessary to comprehend the purpose and object of the AMLR. This is amply set out in rr. 2.03 and 2.04.

[74] Rule 2.03 sets out the purpose of the rules which is to ensure that its provisions must be complied with by all applicants, listed corporations, their directors, advisers or other persons to whom the requirements are directed. It is evident that the purport of the rule is regulatory, in that it is Bursa that requires compliance from those persons who propose to list a corporation or those who have control of a listed corporation. The purpose of the AMLR is not to regulate Bursa but to enable Bursa to regulate persons participating in the market. And this is so because the AMLR serve to enable Bursa to fulfil its regulatory function for the purpose of carrying out its primary duties under the CMSA, particularly s. 11.

[75] Rule 2.04 sets out the rationale for the AMLR and the principles on which the rules are predicated. It is self-explanatory.

[76] Rule 2.06 which is of central importance, prescribes how the AMLR is to be interpreted namely "in accordance with their spirit, intention and purpose". As well as in a way that "best promotes the principles on which they are based".

[77] Regrettably, neither the High Court nor the Court of Appeal undertook any sort of consideration of the purpose nor principles set out in the rules in order to ascertain the meaning to be accorded to the word "shall" in r. 16.11(2). This was explained on the basis that as there was no ambiguity and there was no necessity to consider anything other than the express words used. This was understood to amount to a literal reading of the relevant rule falling for consideration. In so doing, the Court of Appeal misunderstood the function and purpose of the literal rule of statutory construction. Reading the express words set out in a statute *in vacuo* and without taking into consideration the context in which those words are utilised, does not amount to a literal approach to statutory interpretation. That is a grammatical application of the meaning of words. Section 17A of the Interpretation Acts 1948 and 1967 requires that the purpose and object of an Act and other instruments made under an Act must be undertaken when construing a statute. As s. 17A is a statutory provision, it must be complied with. Therefore, both the High Court and the Court of Appeal, in failing to undertake this task as provided for in s. 17A, committed an error of law.

[78] Turning to the present factual matrix which relates to a company in liquidation, the AMLR has requisite provisions to safeguard the public interest for the purpose of investor protection in such a situation (see r. 2.22

of the AMLR). There is provision that where the directors of a listed corporation are no longer in control, then the person who is in possession and control of the assets and operation of the listed corporation is bound to give an undertaking to comply with the listing rules. This, Afrizan did. However, Afrizan then chose not to comply with the LOU on the grounds that the listed corporation over which he had possession and control was wound up and it then became incumbent upon Bursa to immediately de-list the corporation, as a consequence of which the LOU would become redundant and would not need to be fulfilled by him.

[79] Where an order of court declares that a listed corporation is wound up, the primary concern of Bursa, as we understand it, is to ensure that there is continued compliance with the rules, *ie*, the AMLR, so that there is continued disclosure about the workings of the listed corporation, and the steps being taken to keep it in operation or otherwise. Such disclosure through periodic returns comprises the primary means by which the investor public will be apprised of what is going on in the wound-up entity, which remains a listed corporation. Therefore, such disclosure is of central importance and the rules are crafted to regulate the same.

[80] A further complication is that in a winding up situation, the directors cease to have control of the assets and operations of the company, which are taken over by a liquidator. The liquidator is in possession of the assets of the listed corporation and has primary control over the operations and assets of the company.

[81] It is for this reason that the Listing Requirements in the form of the AMLR in this appeal require that the liquidator, as the new person taking over control, ensures continued compliance. To this end, a letter of undertaking is required of the liquidator to ensure such compliance. This is set out in r. 2.22(1) of the AMLR which is *pari materia* with para. 2.22 of the Main Listing Requirements (referred to in the questions of law posed as the "main LR") – it provides that a person such as a liquidator of the listed corporation who is the "controlling person" must ensure and must give Bursa an undertaking in the prescribed form.

[82] The existence of r. 2.22(1) of the AMLR in itself evidences the fact that upon the pronouncement of a winding-up order in relation to a listed corporation, Bursa is not bound to immediately de-list the entity. If so there would be no provision for the person in control of the wound up listed corporation to provide continued disclosure, as it would be superfluous. This, in turn, fortifies the interpretation of "shall" as not being mandatory in nature, but directory, at the behest of Bursa.

[83] Given that Afrizan had complied with r. 2.22(1), it was incumbent upon him, as liquidator, to ensure compliance with the AMLR, both by reason of the sheer existence of the rules as well as the specific LOU provided by him. It is completely untenable for the liquidator, as the person in control

of the listed corporation, to take matters into his own hands and undertake his own construction of the listing rules to determine that he no longer owes any obligation of compliance. This too, by undertaking his own personal construction of r. 16.11(1) and 16.11(2), and then concluding that because one says "may" and the other says "shall" respectively, r. 16.11(2) must be complied with by Bursa resulting in the liquidator no longer having any duty of compliance.

[84] Moreover, Afrizan went on to unilaterally implement his own construction of the rules, notwithstanding the LOU he had personally executed. This is untenable on the part of any prudent, responsible liquidator who is bound to have cognisance of the workings of a listed corporation and the impact of winding up on the interests of investors as a whole. The Court of Appeal erred in accepting such a flawed argument without undertaking any form of statutory interpretation itself.

[85] At this juncture, it warrants reiteration that even the literal mode of statutory construction does not allow for the interpretation of words *in vacuo* – particularly a word like "shall" which takes its colour from the context and circumstances in which it is utilised.

[86] Apart from the clear legal position we have alluded to above, namely that it lies not in the hands of the person who has control of the listed company and who is bound to comply with the AMLR, to conclude unilaterally that he has no obligation or duty either personally or on behalf of the listed corporation to carry out an express obligation he has agreed to, the interpretation placed on the word "shall" is clearly flawed, as we have explained at length above, for the failure to look at the entirety of the AMLR and the CMSA.

[87] Simply put "shall" is not always mandatory and "may" is not always directory. The Court of Appeal undertook an inadequate, imperfect and rigidly narrow construction of the AMLR and failed entirely to have regard to the CMSA, as a consequence of which it reached a conclusion that is flawed.

[88] A further and important reason for concluding that the term "shall" in r. 16.11(2) of the AMLR does not connote nor warrant a meaning that the word is utilised in its mandatory form, is the effect or consequence of construing it as mandatory in nature. The net result of interpreting the word "shall" in the said rule as amounting to a mandatory directive, is that upon the pronouncement of the order of winding up by the High Court, Bursa is bound to immediately de-list the listed corporation with no opportunity to ascertain the basis for the winding up or whether the listed corporation is truly insolvent or has been wound up for one of the numerous other bases specified in the winding-up legislation under the Companies Act 2016. Neither is the fact that the order may not be final but subject to further legal challenge allowed to be taken into consideration.

[89] It should be borne in mind that a company can be wound up simply for failing to respond to a statutory notice to pay a stipulated sum which is not a large quantum. That in, itself, invokes a presumption of insolvency which falls to be rebutted by the company. If the company has not had an opportunity to do so, the consequences can be dire.

[90] When this is coupled with a reading of r. 16.11(2) of the AMLR such that the listed corporation is also immediately de-listed the consequences on the investing public will also be dire. The fact of de-listing will have an immediate impact on all investors who have invested in the listed corporation. The damage to the investors is irreparable.

[91] If the order of winding up is then reversed on appeal or stayed, then the de-listing would have already occurred, with no opportunity to reverse that, simply because de-listing cannot be reversed. It would take considerable time, work and numerous other factors to list afresh. The listed company and the investor public, *ie*, the shareholders of Wintoni would have suffered irreparable damage. The listing status of a company, as submitted by Bursa, has a value attached to it. (See *Yeoh Eng Kong v. Dato' Nik Ismail Nik Yusoff & Ors* [2017] 7 CLJ 369). That value would be irrevocably lost if de-listing were to immediately follow the making of a winding-up order without any opportunity being accorded to Bursa to evaluate the circumstances leading up to the same. More importantly given the level of damage that would be suffered by both the investing public and the listed corporation, such a reading is contrary to the statutory duty of Bursa to protect the interests of public investors.

[92] In this context, it is pertinent that rr. 9.19 and 9.20 of the AMLR require a listed corporation to make an announcement relating to the default or circumstances leading to both the filing of the winding-up petition and the steps proposed to be taken in relation to the same. It is submitted for Bursa that the purpose of these rules is to enable Bursa to ascertain and evaluate for itself whether the winding-up order made is final and conclusive and not subject to further legal challenge prior to it taking a decision to de-list the corporation. These rules also lend credence to the interpretation that the word "shall" utilised in r. 16.11(2) is not mandatory nor immediate but is prescriptive in directory terms, leaving the ultimate decision whether or not to Bursa to take upon a full evaluation of the circumstances of the particular case.

[93] Finally, the fact that the winding-up order against Wintoni was terminated on 17 September 2019 illustrates the danger of construing the word "shall" *in vacuo* and without consideration for the rest of the AMLR and the CMSA.

[94] In summary, therefore, the consequences of reading "shall" as a mandatory consequence of an order of winding up which is capable of being reversed is dire.

Waiver And/Or Modification

[95] Rules 2.07(2) of the AMLR and 2.06(2) of the Main Listing Requirements allow Bursa to waive or modify compliance with the Listing Requirements. The effect of this provision in the AMLR is clear, namely that Bursa is empowered to modify or waive compliance with the rules when such compliance would not meet its statutory duties under the CMSA or is not in the spirit, intention and purpose of the AMLR. In the present context, it means that Bursa is entitled to decide to waive or modify the effects of r. 16.11(2), even if it is read in its most extreme form of imposing a positive and immediate obligation to de-list. Therefore, even if it is read as amounting to a mandatory requirement, Bursa could not be faulted for deciding not to de-list the corporation immediately, given its powers to balance the need to de-list against the public interest of investor protection.

[96] Ultimately, the question before us is this:

(i) was it the intention of the drafters of the AMLR and the purpose and object of the AMLR to provide that upon a winding-up order being pronounced a listed corporation had to be mandatorily de-listed; or

(ii) was it the intention of the legislature and the regulatory authority that upon such an order being pronounced, that the regulatory authority was conferred with the power to de-list the listed corporation as a directory rather than a mandatory statutory directive? Meaning that Bursa is empowered to determine whether and when such directive is to be exercised.

[97] Taking into effect all the factors alluded to above, we have no hesitation in concluding that the second construction is to be preferred. This means that the word "shall" is not mandatory in nature but is directory, meaning that Bursa may de-list the listed corporation after taking into consideration the relevant interests as outlined in the CMSA and the AMLR, at an appropriate time, and not immediately upon pronouncement of the winding-up order.

[98] As such, we answer questions 2 and 3 in the affirmative. Accordingly, question 4 is also answered in the affirmative.

[99] Once the foregoing questions are answered in the affirmative, particularly questions 2 and 3, namely that there is no duty or obligation on the part of Bursa to immediately de-list a company upon a pronouncement of the listed corporation having been wound up, it follows that the liquidator, as the person in control, was duty-bound to comply with the rest of the provisions of the AMLR. This answers question 1.

[100] This duty was doubly reiterated by his signing of an express letter of undertaking personally. No excuse is afforded to him for failure to comply with the letter of undertaking by reason of his contention that there was a mandatory obligation on the part of Bursa to de-list the corporation, thereby

obviating the need for his compliance with his duties as listed under the AMLR to provide timely and accurate disclosure either directly or to ensure compliance through the directors. And there is no excuse because it is not open to the liquidator to undertake his own interpretation of the AMLR, and then proceed to act on it unilaterally, notwithstanding his express agreement to abide by the rules.

[101] More importantly, there would be complete chaos in the market and exchange if individuals such as the liquidator here choose to undertake their own interpretation of the rules and proceed to implement or act on their comprehension of the meaning to be attributed to the AMLR or the Main Listing Requirements, rather than an accepted interpretation. There must be acquiescence from Bursa or the court to warrant such steps being undertaken by parties who have chosen to participate in and comply with the law relating to markets and exchanges.

[102] However, notwithstanding our answers to questions 1, 2, 3 and 4, it should be clarified that there is an express duty on the part of a liquidator of a listed corporation to comply with the AMLR or the Main Listing Requirements as the case may be, so long as the wound-up company remains listed. This follows as a matter of express provision – see s. 480 of the Companies Act 2016 as well as case law – see *Yeo Ann Kiat & Ors v. Hong Leong Bank Bhd & Anor* [2016] 9 CLJ 207; [2016] 6 MLJ 499 per Vernon Ong JCA (as His Lordship then was). A court appointed liquidator is an officer of the court with express and clear duties and functions. It must follow that as an officer of the court, he is cognisant of, and complies with the law. The highest standards in respect of compliance with the law are required of him.

[103] In the instant case, in view of the express provisions of the CMSA, which the liquidator was bound to be cognisant of, as he was undertaking the liquidation of a listed corporation, he ought to have been fully aware that the provisions of the CMSA prevail over that of the law relating to corporations where public interest in the form of investor protection is concerned. As such, and given the express LOU he executed, it is clear that the liquidator is bound by the law as set out in, *inter alia*, the CMSA and the AMLR. The express provisions of the LOU make this clear beyond dispute. It specifies that in consideration of Bursa allowing Wintoni to remain listed and on the official list. He, the liquidator, undertook and agreed to comply with the AMLR and any amendments to the same in so far as they are applicable to him. To try and avoid such an express and unequivocal legal obligation of disclosure in the interests of both Wintoni and the investor public, by suggesting that Bursa was bound to de-list Wintoni thereby absolving him from any need to comply with the LOU, is unacceptable conduct on the part of an officer of the court, from whom the highest standards of integrity are expected. It has been contended for Afrizan that the use of the words "in so far as the same apply to me" somehow exonerates him from the obligation

A to comply with the LOU. However, those words cannot override his statutory duty as a liquidator to fulfil this requirement. This is borne out by the decision of *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506; [2012] 1 MLJ 369 per Ramly Ali JCA (as His Lordship then was).

B **[104]** Additionally, the liquidator in executing his functions under the Companies Act 2016, is expected to do so bearing in mind the interests of not only unsecured creditors but also secured creditors and shareholders. Again, as an officer of the court, he is expected to adopt and practice an unbiased, impartial and honest approach to his duties as a whole. C (See *Re Contract Corporation* (*Gooch*'s case) (1871) LR 7 Ch App 207 as applied in *Australian Securities and Investments Commission (ASIC) v. Dunner* (2013) 303 ALR 98).

[105] Finally, question 5 relates to whether a director of a listed corporation in liquidation can continue to ensure compliance with the AMLR where D there is no authorisation by the liquidator or the court. The answer to this question is in the negative because the director cannot provide the requisite disclosure as stipulated under the AMLR or the Main Listing Requirements without the consent, authorisation or approval of the liquidator who is the person in control of the listed corporation in liquidation. He, therefore, has E no basis on which to provide such disclosure.

[106] It is the duty of the person in control, namely the liquidator, to provide such disclosure. The liquidator is in a position to procure the relevant information from the directors or to direct them to provide the requisite disclosure to Bursa. In point of fact, it is incumbent upon the F liquidator to procure the directors to make the requisite disclosure in compliance with the AMLR where he is unable to do so personally because he is unable to do so or has no relevant knowledge. It is his legal obligation to do so, in keeping with the requirement to comply with the provisions of the law under the Companies Act 2016, the CMSA and the AMLR.

G **[107]** Question 5 is, therefore, answered in the negative.

Conclusion

[108] To sum up, we allow the appeal with costs of RM50,000 here and below and set aside the decisions of the courts below. We answer the H questions of law posed as follows:

(i) Whether compliance with the Listing Requirements is consistent with and/or within the scope of the liquidator's powers and/or duties under the Companies Act 2016 or otherwise in law.

I Answer: Affirmative

(ii) Whether on a proper construction/interpretation of rule/para. 16.11(2) of the Listing Requirements, Bursa Securities is not obliged to immediately and summarily de-list a listed corporation upon the listed corporation being served with a winding-up order without regard to any appeals/legal challenges to the winding-up order but should only do so upon a final determination on the said appeals/legal challenges.

Answer: Affirmative

(iii) Alternatively, whether Bursa Securities is entitled to exercise its discretion to modify and/or waive compliance of its own rules, including rule/paras. 16.11(2) of the Listing Requirements by virtue of, amongst others, r. 2.07(2) of the AMLR and para. 2.06(2) of the main LR.

Answer: Affirmative

(iv) If:

(a) the answer to question 1 is in the affirmative; and

(b) the answer to questions 2 and/or 3 is in the affirmative.

whether the liquidator, as the person in control of the management of a listed corporation in liquidation, must undertake to continue to comply with the Listing Requirements as consideration for the continued listing of a listed corporation in liquidation.

Answer: Affirmative

(v) Whether a director in a listed corporation in liquidation can continue to ensure compliance of the Listing Requirements by the listed corporation without the authorisation by the liquidator and/or court.

Answer: Negative

[109] These grounds of judgment supersede and prevail over the brief grounds delivered on pronouncement of our decision.